IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CR NO. 11-1213 MCA

DENNIS LOVATO,

Defendant,

MOTION TO SUPPRESS STATEMENT

COMES NOW Defendant Dennis Lovato, by his attorney, John F. Moon Samore, Esq., pursuant to the Rules, for his Unopposed Motion to Vacate and Reset Trial and Extend the Time for the Filing of Pre-Trial Motions, to STATE:

STATEMENT OF FACTS

The primary players in this drama are all legally defined as "Indians," Pueblo people who are not Navajo (Dene). The incident occurred in Santo Domingo Pueblo on April 15, 2011. The alleged victim was a 61-year-old Vietnam combat veteran, who returned with severe post-traumatic stress disorder and had spent the remainder of his life earning a violent reputation throughout his community as a brutal man, convicted of multiple violent felonies, given to abusive personal habits as well, and had serious terminal health problems. The Defendant was a 26-year-old young man with no prior felonies who knew of Mr. Lucero by his violent reputation but had never met him personally. Nelson Garcia and Eddie Garcia were two gentlemen traveling with Mr. Lovato that evening, and Mr. Lovato driving Mr. Garcia's 1999 Dodge Durango.

Around midday, Eddie Garcia and Mr. Lovato began drinking, and over the course of the next twelve hours consumed a prodigious amount of alcohol. About ten hours later, Eddie Garcia was passed out in the front passenger seat, and Mr. Lovato was driving Nelson Garcia, another drunken man who had joined Eddie and Dennis in the evening, to the Tesuque Street residence of Mr. Lucero. Mr. Lovato remained in the vehicle outside the property's fence perimeter while Mr. Garcia got out to talk to Mr. Lucero. Mr. Lovato and Mr. Lucero eventually got into an argument and began fighting. The various recollections of Nelson Garcia differ, but a short-time later, Mr. Lucero was lying on his back, coughing and bleeding in front of his home, while Mr. Lovato was driving away from the area with both Garcias as passengers.

When Mr. Lovato saw a marked BIA vehicle, he pulled over to the side of the road and informed the officer that he had been in an altercation with Mr. Lucero. Mr. Lovato was arrested for DWI and taken to tribal headquarters to be photographed and interviewed.

The following morning, he was, while still under the influence of the alcohol he had stopped drinking only at the time of the arrest, interviewed by FBI Agent Russell Romero. Mr. Lovato gave a statement that included several comments which the Prosecution will intend to offer as admissions against interest.

AUTHORITIES

Police must advise suspects of his *Miranda* Rights prior to custodian interrogation. United States v. Miranda, 384 U.S. 436 at 444 (1964). The Supreme Court has defined "custodial interrogation" as "questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The trial court is directed to presume no valid waiver has occurred, North Carolina v. Butler, 441 U.S. 369, 373, 1979, Mincey v. Arizona, 437 U.S. 398 (1985).

This experienced court must be careful in its assessment of "totality of the circumstances," not to confuse calculated, misleading interrogation that overwhelms victim-suspect right to decide with the kind of fair interrogation techniques on which reliability may be better assured. Stein v. New York, 346 U.S. 156, 185 (1953) remains good authority that the Courts "weigh the circumstances of pressure against the power of resistance of the person confessing." The literal truths or factual basis or any statement has no role in this calculus. Missouri v. Seibert, 542 U.S. 600, 608 (2004), United States v. Lopez, 437 F. 3d 1059 (1983).

The Court must still find voluntariness by preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972). Even absent a custodial interrogation, this court still recognizes "coercive police activity as a necessary predicate" to preventing a constitutionally and voluntary confession. Colorado v. Connolly, 479 U.S. 157, 167 (1986). The Court will have to determine if Mr. Lovato, as intoxicated as he was, was capable of making a "free and unconstrained choice." Colombe v. Court, 367 U.S. 568 (1961)

ARGUMENT

Mr. Lovato was interrogated on the record by two federal agents in the morning hours of outrageous alcohol excesses. Even if his waiver is found valid, he was not competent to effectively waive his Miranda Rights. Schneckloth v. Bustamante, 412 U.S. 218 (1973). Mr. Lovato was not capable of rendering a "free and unconstrained choice" to talk to the officers.

No doubt can exist that he was in custody, and, considering the volumes of alcohol consumed, still under the influence of alcohol, and it makes no difference for purposes of this Motion, whether the consumption of alcohol was voluntary or not. While the Defense does not contend the intoxication was involuntary, Mr. Lovato's will was "overborne" under the circumstances.

CONCLUSION

Based upon the totality regarding Mr. Lovato's interview the morning of April 16, he could not have given a valid waiver of his Miranda Rights, and his entire interview should be suppressed.

Respectfully submitted,

/s/ John F. Moon Samore, Esq.
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I hereby certify that a true and correct copy of the foregoing document was faxed to opposing counsel on the 23rd day of August 2013.
/s/ John F. Moon Samore, Esq.